No. 97-303

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HUMANA INC. AND
HUMANA HEALTH INSURANCE OF NEVADA, INC.,
Petitioners,

v.

MARY FORSYTH, MARIETTA CADE,
WILLIE ANDREWS, MARY LOU BUEHLER,
HELEN STAVES, RANDOLPH BRATTON,
AND SEARLE AUTO GLASS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF ON THE MERITS OF PETITIONERS

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October 23, 1998

PARTIES TO THE PROCEEDING BELOW

Pursuant to Supreme Court Rule 29.6, Petitioners refer the Court to Page ii of their Brief on the Merits. There have been no changes since the filing of that brief.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

No. 97-303

Humana Inc. and
Humana Health Insurance of Nevada, Inc.,
Petitioners,

v.

Mary Forsyth, Marietta Cade,
Willie Andrews, Mary Lou Buehler,
Helen Staves, Randolph Bratton,
and Searle Auto Glass, Inc.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

REPLY BRIEF ON THE MERITS OF PETITIONERS

In their opening Brief on the Merits, petitioners observed that the logic underpinning the decision of the Ninth Circuit below, and the decisions of the other circuits that share its view, is flawed. In using an "inverse" federal preemption analysis to justify a "direct conflict" test for the application of the McCarran-Ferguson Act, the Ninth Circuit failed to appreciate that it was using principles developed to

protect the legislative decisions of the states from federal interference to circumscribe a statute intended to foster that same goal. Neither respondents nor the *amici* who have submitted briefs supporting them have attempted to refute this observation. Respondents and most *amici* defend the Ninth Circuit's use of a "direct conflict" test and look to the federal preemption cases for the formulation of that test.[1] None of them justifies that approach, however, by adopting the reasoning of the circuits below, and none attempts an explanation for the logical conundrum presented by the use of states' rights principles to restrict a states' rights statute. Like the fictional observation regarding the deficiencies in the emperor's wardrobe, there is no denying the truth of this observation once made.

As petitioners urged in their opening brief, the reach of the McCarran-Ferguson Act must be determined by reference to the ordinary rules of statutory interpretation. If the "direct conflict" test is to be adopted, it is there that it must find its support; but there is no support to be found. Neither the language of the McCarran-Ferguson Act, nor its structure, nor its history, nor any of the other matters to which respondents, the United States and the other *amici* point will justify the use of that restrictive test. A material variance between state and federal law that renders the state law superfluous -- as is demonstrably the case with RICO

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[1] The brief of *amicus* National Association of Insurance Commissioners ("NAIC")--which is stated to be in support of affirmance but not in support of respondents--does not support the "direct conflict" test but proposes a test that looks at conflicts arising "directly or indirectly." (NAIC Br., pp. 18-19.)

and Nevada law here -- "impairs" or "supersedes" that state law and triggers the prohibitions of the Act.

ARGUMENT

A. The "Direct Conflict" Test Misinterprets The McCarran-Ferguson Act.

As their lead argument, respondents and the government both attempt to defend the "direct conflict" test.[2] Before addressing that issue, however, it is important to note that the argument actually presented by respondents has less to do with justifying that restrictive test than it does with attacking the proposition that the McCarran-Ferguson Act should be applied using "field preemption" principles.[3] This argument attacks a strawman, for petitioners do not urge the application of those principles. *No* federal preemption analysis provides an appropriate way to apply the McCarran-Ferguson Act, and petitioners expressly so noted in their opening brief. (Brief on the Merits of Petitioners ("Pet. Br."), p. 14.)

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[2] Respondents preface this argument with a lengthy recitation of their view of the "facts" of petitioners' alleged misconduct, most of which remain to be tried and are hotly contested. Rehearsing that factual dispute is not of assistance to the interpretive question before the Court.

[3] The government makes a similar mischaracterization of petitioners' argument in its brief. (Brief of the Untied States as Amicus Curiae in Support of Respondents ("U.S. Br."), p. 25).

Federal law applies to the business of insurance unless the federal statute in question "invalidates, impairs or supersedes" state law, and the question before the Court is the meaning of that phrase. It is not petitioners' contention that this phrase precludes application of all federal law, only that it precludes federal law that is at material variance with state insurance law--as to substantive prohibitions, procedures or remedies. That preclusive effect appears in the language, structure and history of the Act.

1. The Language of the McCarran-Ferguson Act Does Not Support the "Direct Conflict" Test.

Respondents and the government both begin their arguments by acknowledging that the interpretation of the McCarran-Ferguson Act must begin with its language, and they purport to find support for the "direct conflict" test in that language. (Brief on the Merits for Respondents ("Resp. Br."), pp. 12-14; U.S. Br., pp. 10-21.)

For their part, respondents argue: (i) the McCarran-Ferguson Act does not provide that federal statutes shall not "apply" to the business of insurance, thus manifesting an intent not to cede the entire field to the states; (ii) the phrase "invalidate, impair or supersede" must be read as a whole without separately parsing the meanings of its three components; (iii) this Court has already equated "impair" with "direct conflict" in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 (1983); and (iv) in the floor debates on the Act, the senators and representatives used the three components of the critical phrase interchangeably without ascribing separate meaning to each. These arguments are without merit.

To begin, none of these arguments, other than the reference to the *Shaw* decision, even addresses the propriety of using the "direct conflict" test. The observation that Congress did not provide that no federal act shall "apply" to the business of insurance addresses the "field preemption" argument that petitioners are not making. Respondents' argument that the three components of the phrase "invalidate, impair or supersede" should not be separately interpreted and applied attacks petitioners' interpretation of the phrase but does not defend equating it with the "direct conflict" test. This argument is also contrary to the interpretive principle that, when words are used in the disjunctive, each must be given its separate meaning -- a principle that is not vitiated by respondents' related argument that the words were not used with precision in the floor debates. *See, e.g., Garcia v. United States*, 469 U.S. 70, 73 (1984).

Respondents' only argument actually addressed to the propriety of using the "direct conflict" test -- their citation to *Shaw v. Delta Air Lines* -- simply misreads the case. The Court's discussion of the meaning of "impair" in *Shaw* involved the application of § 514(d) of ERISA which provides that ERISA shall not "be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States," and that discussion is not supportive of respondents' position. 463 U.S. at 100-02. To the contrary, the Court there notes that an interpretation of ERISA that would leave the substantive provisions of Title VII of the Civil Rights Act unaffected but would preempt state laws that provide procedures and remedies that Congress intended be available to litigants in Title VII's enforcement *would* "impair" federal law. *Id.* at 102. That is hardly the "direct

conflict" test that respondents would apply and is, in fact, supportive of the interpretation that petitioners urge for the same term in the McCarran-Ferguson Act.

The language from *Shaw* that respondents quote on page 14 of their brief, and upon which they base their claim that the Court has equated "impair" with "direct conflict," was not part of the Court's discussion of the meaning of "impair." The quoted language appears six pages after the end of that discussion and simply states the Court's conclusion respecting the extent to which the state law at issue was preempted under ERISA. Reliance upon that language repeats the logically flawed "inverse preemption" analysis. Unless the restrictive principles of preemption analysis were intended by Congress, this part of *Shaw* is of no relevance.

As the principal effort of its brief, the government attempts to find such an intent to adopt preemption principles in Congress' choice of the words "invalidate," "impair" and "supersede," which the government argues must be understood as coming from and incorporating the preemption jurisprudence of the time. (U.S. Br., pp. 11-19.)[4] The government further supports this argument by reference to the declaration of purpose found in the Act. (U.S. Br.,

[4] Respondents make an abbreviated argument to the same effect. (Resp. Br., pp. 18-20.) On this point, respondents and the government part company with *amicus* NAIC, which recognizes in its brief that "Congress intended to give *broad* support to existing and future state systems for regulating the business of insurance." (NAIC Br., p. 17 (Emphasis in original).)

pp. 19-21.) Although more relevant than the arguments presented by respondents, these efforts also fall short.

(a) *The Source of "Invalidate, Impair or Supersede."* The government urges that the terms "invalidate," "impair" and "supersede" were adopted by Congress from the dissenting opinions in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), and have the special meanings intended by the authors of those dissents. The government further argues that those special meanings were consistent with the meanings generally ascribed to them by the Court in its contemporary decisions.

On this analysis, the government interprets "invalidate" as being synonymous with "preempt," a proposition with which petitioners are in accord. The government finds a similar equivalence between "supersede" and "preempt" noting that the former term was often used by this Court in earlier decisions where the term "preempt" would be used today. None of the cited cases suggest that the term "supersede" must be so constrained, however, and limiting "supersede" to the *de jure* supplanting of state law being discussed in those early cases--excluding the *de facto* supplanting that petitioners urge the Act was also intended to preclude--would render that term entirely duplicative of "invalidate."[5]

[5] The government attempts to deal with this flaw in its argument in a footnote (U.S. Br., pp. 16-17 n.6.), asserting that "invalidate" means preemption *without* a supplanting federal statute while "supersede" means preemption *with* such a statute. This distinction makes no sense in the

(continued...)

With respect to "impair," the government concedes, as it must, that the normal usage meaning of "impair" is as petitioners have urged. (U.S. Br., p. 14.) The government argues, however, that "impair a law" has a different, more specialized meaning that equates with "direct conflict" preemption. The authorities it cites do not support that proposition.

Most of the government's citations do not even address "impairing" laws. For example, *United States v. Waddill, Hollard & Flinn, Inc.*, 323 U.S. 353, 357 (1945), addresses impairment of a lien priority created by federal law by reason of rights vested under state law. *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369, 377-78 (1930), involved the issue of whether the Federal Water Power Act precluded a claim by an owner of private hydroelectric facilities for impairment of his vested rights in water flow. 280 U.S. at 374-75. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 143 (1938), addressed the question of whether a debtor's right to defend a contested claim was impaired by a treaty of the United States.[6]

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[5](...continued)
context of the McCarran-Ferguson Act which is triggered only if there *is* a federal statute that may supplant state law, leaving the term "invalidate," as the government interprets it, of no possible applicability.

[6] Other decisions use "impair" to address the general effect of the commerce clause on state legislative prerogatives, *e.g.*, *New York, N.H. & H.R.R. v. State of New York*, 165 U.S. 628, 631 (1897), or the effect of state (continued...)

Only two of this Court's decisions cited by the government actually deal with whether a federal statute "impairs" other laws. One of these is *Shaw v. Delta Air Lines*, *supra*, 463 U.S. 85, which as already discussed above, gives "impair" a far broader meaning than "direct conflict." The other is *Rice v. Board of Trade*, 381 U.S. 247, 255 (1947), which similarly uses "impair" in a broader context. That decision speaks both of federal law not being construed "to impair any [applicable] State law" and also of state law that might "in any way impair the federal regulatory scheme." The latter use of impair cannot possibly mean to preempt -- since state law cannot preempt federal regulation -- and seems clearly to refer to a broader range of interactions than a "direct conflict."

In the end, the government's argument on "impair" depends entirely upon the use of that term in Justice Jackson's dissent in *South-Eastern Underwriters* and upon the argument that Justice Jackson effectively defined the term to mean preempted in part and that Congress adopted his definition. Whether the government has correctly read Justice Jackson's intent correctly from the isolated phrase relied upon is dubious at best. More fundamentally, however, the government's assertion that the word "impair" in the McCarran-Ferguson Act comes from Justice Jackson's dissent is demonstrably wrong.

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[6](...continued)
law on what the commerce clause reserves to the federal government generally, *Parker v. Brown*, 317 U.S. 341, 368 (1943).

The government's assertion that the terms "invalidate," "impair" and "supersede" come from the dissents in *South-Eastern Underwriters* is not supported by any authority other than the fact that the terms can be found in those dissents. Indeed, the government does not contend that the terms can, in fact, be traced to those dissents, only that the dissents "appear" to be the source. (U.S. Br. at 13.) Whatever validity the causal inference drawn by the government might have for "invalidate" or "supersede"--and it is doubtful at best--it is irrefutably wrong for "impair."

The term "impair" is taken not from Justice Jackson's dissent but from the bill that was introduced in the unsuccessful effort to enact an earlier version of the McCarran-Ferguson Act in the 78th Congress in 1943, a year before Justice Jackson's dissent was written. The operative language of that bill--which was addressed only to the antitrust laws--provided that those laws should not be construed "to apply to the business of insurance or to acts in the conduct of that business or in any wise to *impair* the regulations of that business by the several States." (H.R. 3270, introduced September 20, 1943) (emphasis added).) The term "impair" as used here cannot be reconciled with the narrow meaning urged by the government. It is plainly a "catchall" term designed to protect state regulation from indirect interference even after all possibility of direct conflict is eliminated by making the federal law entirely inapplicable; and it is clearly the genesis of the same term--accompanied by "invalidate" and "supersede"--that eventually appears in the expanded version of the bill introduced in, and later adopted by, the 79th Congress.

In sum, there is simply no foundation for the government's contention that Congress intended any meaning for "invalidate, impair or supersede" other than that which follows from the ordinary usage of those words.[7]

(b) *The Declaration of Purpose.* The government's more general reference to section 1 of the Act is no more supportive of its limited reading of "invalidate, impair or supersede." To the contrary, section 1 recites that Congress does not intend "to impose *any* barrier to the regulation or taxation of such business by the several States." (Emphasis added.) The notion that the McCarran-Ferguson Act is limited to the *de jure* barrier of federal preemption, and does not include the *de facto* barrier addressed by petitioners, is not merely unsupported by, but affirmatively contrary to, this pronouncement.

2. The Structure of the McCarran-Ferguson Act Does Not Support the "Direct Conflict" Test.

Both respondents and the government argue that the structure of the McCarran-Ferguson Act supports the direct conflict test and both again attack the strawman of field

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[7] Even if the reverse were true, the government's attempt to equate that phrase with the "direct conflict" test would still contain a logical gap. The approach to implied federal preemption enunciated by the Court's most recent decisions -- which define the standard for application of the McCarran-Ferguson Act for the courts that employ the "direct conflict" test -- is of relatively recent origin. *See Cipollone v. Liggett Group*, 505 U.S. 504, 545-48 (1992) (Scalia, J., dissenting). If Congress intended to incorporate contemporary preemption jurisprudence into the Act in 1944, it would not be this recent jurisprudence.

preemption. If Congress intended field preemption, they argue, why does Section 2(b) of the Act contain its specific reference to the antitrust laws? (Resp. Br., pp. 15-16; U.S. Br., pp. 25-26.) The short answer is that already provided above: Petitioners do not contend that field preemption is a viable principle to apply to the McCarran-Ferguson Act.

The argument respecting the antitrust laws advanced by respondents and the government suffers from a deeper problem, however, for it demonstrates a fundamental misconception as to the history of the special provisions addressing the antitrust laws. The most contentious part of the McCarran-Ferguson Act during the Congressional debates was the antitrust exemption, and the bill that originally passed the Senate provided no such immunity to the insurance industry. Section 2(b) of that bill read: "No act of Congress, *except* [the Sherman Act and the Clayton Act], shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . ."[8] 91 Cong. Rec. 488 (January 25, 1945) (emphasis added). The present version of the Act came out of the Conference Committee which modified the Senate's antitrust *exception* to the preclusive effect of the Act by providing, as had the Senate bill, that the antitrust laws would apply to the business of insurance notwithstanding the preclusive effect of section 2(b) but eliminating that exception if the states adopted laws

[8] For the antitrust laws, the preclusive effect of this bill was limited to a moratorium ending a few years later. *Id.* A revised version of this moratorium became section 3 of the Act.

regulating the insurance industry: "Provided, That after June 30, 1948 [the Sherman Act, the Clayton Act and the FTC Act] shall be applicable to the business of insurance to the extent that such business is not regulated by State law." It could not be plainer that, in the eyes of the Congress that enacted the McCarran-Ferguson Act, the business of insurance was to be immune from the antitrust laws because application of those laws would "invalidate, impair or supersede" state regulation.[9]

The issue of whether the federal antitrust laws "invalidate, impair, or supersede" state law has never been a part of this Court's analysis of the McCarran-Ferguson Act's applicability in this area because the broad preclusive intent of Congress was clear. *See, e.g., Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 790 n.17 (1993); *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25, 40-41 (1996). But if the application of the Act to the antitrust laws depended upon whether those laws "invalidate, impair or supersede" state law under the "direct conflict" test, the antitrust immunity that has been recognized for over 50 years might well be jeopardized -- as is illustrated by a recent decision of the district court regarding the antitrust claim in this case that is still pending below but not now before the Court. Reading the Ninth Circuit's decision as requiring the application of the "direct conflict" test even to the antitrust laws, the district court has concluded that application of the antitrust

[9] As the government notes, "Congress knew how to give state law such a broad preemptive effect, and expressly did so with respect to the Sherman Act . . . ." (U.S. Br., p. 25.) The phrase "invalidate, impair or supersede" is how Congress did it.

laws to the business of insurance is not barred by the McCarran-Ferguson Act.[10] It is the "direct conflict" test, not petitioner's interpretation of the Act, that threatens perverse results in this area.

In addition to their argument respecting the antitrust laws, the government and respondents also see structural problems in petitioners' interpretation of the Act arising out of the application of that interpretation to criminal law and taxation, suggesting that petitioners' approach necessarily results in preclusion of federal criminal law and the federal power to tax. (Resp. Br., pp. 47-48; U.S. Br., pp. 26-27.) Not so.

Petitioners urge that federal legislation that does not conflict with state law in its substantive prohibitions must be examined for whether it provides civil procedures or remedies that render the otherwise parallel state law superfluous – *i.e.*, whether the federal legislation "supersedes" the state law, or "impairs" the limits placed on the state remedies by affording a federal claim that overshadows the state law and makes it meaningless from any practical perspective. Critical to this analysis is the fact that state and federal civil law are generally concurrent in that a civil plaintiff can avail itself of whatever body of applicable law is most attractive. This consideration is not present in criminal law or taxation.

As the Eighth Circuit has noted in *United States v. Blumeyer*, 114 F.3d 758, 768 (8th Cir. 1997), there is no

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[10] A copy of the decision of the district court to that effect in this action is set forth in the Appendix hereto.

such overlap of available remedies with respect to criminal law enforcement. Private litigants cannot bring criminal prosecutions, and the governmental authorities who can do so cannot select the body of law they like best. The Department of Justice prosecutes federal crimes. The state equivalents prosecute state crimes. Neither can elect to proceed under the laws of the other sovereign. Accordingly, no federal criminal statute can render superfluous a parallel state criminal statute, and the same reasoning obviously applies to the tax laws inasmuch as each sovereign also levies and collects its own taxes. The federal laws in this area -- other than criminal laws which set different substantive standards -- have no effect on the enforcement of analogous state law and, hence, would not "invalidate, impair or supersede" that law.

As its final structural argument, the government complains that adoption of petitioners' analysis would embroil the courts in impossible debates about the balance of policies embodied in state remedies. (U.S. Br., pp. 27-28.) That argument badly misreads petitioners' position, for petitioners seek to avoid, not encourage, the inappropriate balancing that the government references. If there is a material difference in state and federal remedies, with the federal remedies being the more attractive, the analysis is at an end. As petitioners urged in their opening brief, the federal courts have no business engaging in an assessment of the importance of a state's legislative decision on remedies or in a balancing of those decisions against other considerations.

3. The Legislative History And Caselaw Do Not Support the "Direct Conflict" Test.

As further supposed support of the "direct conflict" test, respondents' brief contains a lengthy discussion of legislative history in an attempt to demonstrate that Congress intended a restrictive interpretation of the McCarran-Ferguson Act. (Resp. Br., pp. 23-33.) The legislative history actually demonstrates the contrary, as petitioners discussed in their opening brief. (Pet. Br., pp. 25-27.)

Respondents begin their discussion of legislative history with citations to historic discussions of insurance fraud, a subject not prominently found in the Congressional debates on the McCarran-Ferguson Act. Respondents then note, correctly but irrelevantly, that the final version of the Act emerged from a conference committee that reconciled the House's desire for near total exemption from federal law with the Senate's somewhat more limited vision. Respondents begin to get to the point in their review of the floor debates, but there respondents look to the remarks of Senators Pepper and Murdock, who were on the *losing* side of the debate in the Senate. Respondents finally turn to the "catch-all" remarks of Senator O'Mahoney already noted in petitioners' opening brief. (Pet. Br., p. 26 n.14.)

The bottom line that respondents draw from this history is that Congress did not intend "field preemption" by the McCarran-Ferguson Act. In fact, the legislative history referenced by respondents might well suggest the contrary, but the point is of no moment. As already noted several times, the continuing attack on "field preemption" is a red herring that is not helpful to analyzing the interpretive question that is actually before the Court. Nor does the

legislative history support a narrow interpretation of the McCarran-Ferguson Act, as respondents alternatively argue. Indeed, respondents' lengthy discussion of the fact that the phrase "invalidate, impair or supersede" was intended as a "catchall" plainly shows an intent that the Act have broad applicability, "catching" all federal legislation other than that specific to the business of insurance.

The caselaw cited by respondents and the government is not to the contrary. The decisions cited by respondents supporting a broad interpretation of RICO are obviously of no relevance; the interpretation of RICO is not before the Court, except for the conceded point that RICO does not "specifically relate" to the business of insurance. Nor do the cited decisions of this Court addressing the McCarran-Ferguson Act -- *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969), *Department of Treasury v. Fabe*, 508 U.S.491 (1993) and *Barnett Bank, N.A. v. Nelson*, 517 U.S. 25 (1996) -- support respondents' position here.

Both *Fabe* and *National Securities* dealt principally with the question of what conduct constitutes the business of insurance; *Barnett Bank* dealt with the question of whether the federal statute at issue "specifically relate[d] to the business of insurance." *Fabe* did not address the meaning of "invalidate, impair or supersede" at all, the parties having conceded this element. 508 U.S. at 501. *Barnett Bank* similarly did not address the meaning of that phrase, and the government's attempt to convert the Court's short-hand reference to the Act as an "anti-pre-emption" statute into a definitive characterization is quite a stretch. *National Securities* did address "invalidate, impair, or supersede" but only in passing, noting an absence of conflict between the

substantive prohibitions of Arizona and federal laws because the state and federal law were directed at the protection of different constituencies -- policyholders and shareholders -- a factor that the Court noted was of critical importance: "Different questions would, of course, arise if the Federal Government were attempting to regulate in the sphere reserved primarily to the States by the McCarran-Ferguson Act." *National Securities*, 393 U.S. at 463. The Court did not there address the issue here presented -- the consequences of differing remedies when state and federal law are directed at protecting the *same* constituencies -- and the decision cannot be read as an attempt by the Court to supply a definition of universal application for the "invalidate, impair, or supersede" phrase that is critical to the issue now presented.

B. The Argument That RICO "Supplements" State Law Actually Demonstrates That RICO "Impairs" Or "Supersedes" State Law.

As an alternative to their arguments in defense of the "direct conflict" test, respondents, the government and the other *amici* also argue that RICO survives an analysis under a conventional interpretation of "invalidate, impair or supersede" because RICO "supplements" state law by providing civil remedies not available under state law. This argument is simply the assertion that they prefer RICO to the laws enacted by the several states dealing with the same conduct. Having lost their efforts to obtain RICO-like remedies from the state legislatures, or to have Congress specifically apply RICO to the business of insurance, they do

not want to be relegated to the remedies those state legislatures have provided.[11]

The plea that state remedies are inadequate, or that RICO is a critical federal tool in combating what respondents see as rampant corruption in the insurance industry,[12] is

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[11] Respondents argue that Nevada's "little RICO" act does reach the conduct at issue here and the district court's contrary determination was erroneous. (Resp. Br., pp. 5-6 and 34 n.29.) In so arguing, respondents rely upon: (i) the fact that a deputy attorney general drafted an indictment that was never filed; and (ii) the inclusion of obtaining money under false pretenses and of violation of NEV. REV. STAT. § 686.291(1)(b) -- prohibiting false claims -- as predicate acts. The drafting of an indictment never filed obviously proves nothing, and the conduct at issue here -- allegedly improper withholding of benefits -- does not constitute either of those predicate acts.

[12] Respondents support this public policy argument by referencing the well-publicized problems of Columbia/HCA Healthcare, which company respondents assert "Humana simply merged with, and changed its name to . . .." (Resp. Br., p. 45.) While petitioners are loathe to dignify this argument by addressing it at all, or to allow the inference that respondents' accusations directed at Columbia/HCA Healthcare are meritorious, they cannot let the argument pass without noting that respondents know that its predicate is untrue. As respondents know from proceedings below, petitioners did not merge with Columbia/HCA Healthcare. Although certain hospital assets of Humana were eventually acquired by Columbia/HCA Healthcare -- giving Columbia/HCA Healthcare an interest in this litigation, as

(continued...)

more properly directed to Congress than to this Court. Indeed, it was unsuccessfully advanced to the 78th Congress by the Justice Department when the predecessor to the bill that eventually became the McCarran-Ferguson Act in the 79th Congress was first introduced:

> The Department of Justice also urged that the Federal Government should interfere with State regulation where the latter is not adequate according to a standard determined by the Department of Justice. The committee is not impressed by such argument.

S. Rep. No. 78-1112, at 5 (1944). Only Congress can reverse that judgment.

CONCLUSION

For the reasons discussed herein and in the opening brief of petitioners, the decision below of the United States Court of Appeals for the Ninth Circuit should be reversed and this action remanded with instructions that the prior decision of the district court be affirmed.

October 23, 1998

Respectfully submitted,

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[12](...continued)
disclosed in petitioners' opening brief -- Humana Inc., is an independent, publicly-held company traded on the New York Stock Exchange.

APPENDIX

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APPENDIX

Appendix
September 21, 1998 Order of the United States District Court for the District of Nevada in *Forsyth v. Humana*

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

No. CV-S-89-0249-DWH(LRL)

ORDER

(Filed September 21, 1998)

MARY FORSYTH, et al.,

Plaintiffs,

vs.

HUMANA, INC., a Delaware corporation, HUMANA HEALTH INSURANCE OF NEVADA, INC., a Nevada corporation; and DOES I through X, inclusive,

Defendants.

This case is on remand from the Ninth circuit, *Forsyth v. Humana, Inc.* 114 F.3d 1467 (9th Cir. 1997). It was assigned to this Court after Judge Pro recused himself in fall, 1997. Before the Court is defendants' motion for summary judgment on the antitrust claims. (#996, opp. #1001, errata to opp. #1003, reply #1005.) Also before the Court is a "supplemental" memorandum in support of summary judgment (#1022, opp. #1023, reply #1025); this supplemental memorandum actually raises a new ground for summary judgment.

There are two groups of plaintiffs: employer purchasers of group health insurance policies issued by Humana Health Insurance of Nevada ("Premium Payors"), and employee beneficiaries of those who made co-insurance payments for care received ("Co-Payors").

The Co-Payors received care from Humana Hospital-Sunrise ("Sunrise"), an acute care facility owned by defendant Humana Inc. Humana Insurance was obligated to pay 80% of the employee's hospital charges over and above a designated deductible, and the Co-Payors were to pay the remaining 20%. However, unknown to plaintiff, Humana Insurance had a discount arrangement with Sunrise Hospital, resulting in Humana Insurance ultimately paying significantly less than 80% of Sunrise's charges and the Co-Payors paying more than the supposed 20%

The Co-Payors contend Human Insurance breached its contract and violated ERISA by failing to pass along Sunrise Hospital's discounts in the form of reduced co-payments. They also claim violation of ERISA for breach of fiduciary duties, engaging in prohibited transactions and retaining excessive compensation. Both plaintiff groups claim

violation of Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, and a scheme to defraud in violation of RICO, 18 U.S.C. §§ 1961-1968.

The ERISA portion of the case has been disposed of. The Ninth circuit affirmed Judge Pro's grant of summary judgment for defendants on the fiduciary duty claim, but also affirmed summary judgment in favor of plaintiffs on the breach of contract claim. The Court also affirmed the computation of damages, i.e., all amounts they were forced to pay over and above their contractual co-payment obligations. Only determination of the specific amount of ERISA damages remains.

The antitrust claims will be discussed more fully below, but, essentially, the Ninth Circuit found an issue of fact as to the definition of the relevant market. 114 F.3d at 1477. The court also found three instances of impermissibly anticompetitive conduct: Sunrise's refusal to provide Level III neonatal care (of which it was the only hospital certified to provide), Sunrise's diversion of indigent or low-paying critical care patients to other hospitals, and Humana's alleged threats to physicians who did not support its monopoly. 114 F.3d 1472-73.

STANDARD

Summary judgment should be granted if the evidence, read in the light most favorable to the nonmoving party, demonstrates that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Taylor v. List*, 880 F.2d 1040, 1044 (9th Cir. 1989). "There is no genuine issue of

material fact if the party opposing the motion 'fails to make an adequate showing sufficient to establish the existence-of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Taylor*, 880 F.2d at 1045 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). Nor is there a genuine issue of fact if a rational trier of fact could not find in favor of the party opposing the motion for summary judgment. *Taylor*, 880 F.2d at 1045 (citing *Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574, 586 (1986)). Finally, conclusory allegations that are unsupported by factual data cannot defeat a motion for summary judgment. *Taylor*, 880 F.2d at 1045.

I. Market Power

Defendants' first argument is that they are entitled to judgment on the issue of market power, because even in the smaller submarket alleged by plaintiffs, defendants have less than 60% of the market share. 15 U.S.C. § 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....

A. Monopolization

To show monopolization, plaintiff must show (1) possession of monopoly power in the relevant submarket; (2) willful acquisition or maintenance of that power; and (3) causal antitrust injury. *Pacific Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 817 (9th Cir. 1992).

As noted by the Ninth Circuit above, a circumstantial showing of monopoly power requires plaintiff to: (1) define the relevant market; (2) show that defendant owns a dominant share of that market and (3) show that there are significant barriers to entry into the market and existing competitors lack the capacity to increase their output in the short run. 114 F.3d at 1375.

The definition of the relevant market is a factual inquiry and the court may not weigh evidence or judge credibility. *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1435 (9th Cir. 1995). The relevant market is the group of sellers who have the actual or potential ability to deprive each other of significant levels of business. *Thurman Indus. v. Pay N Pak Stores*, 875 F.2d 1369, 1374 (9th cir. 1989).

On its review of this case, the Ninth Circuit found there may be a relevant submarket in the major for-profit acute care hospitals in Clark County. A submarket exists if it is sufficiently insulated form the larger market so that supply and demand are inelastic with the larger market. *Morgan, Strand, Wheeler & Briggs v. Radiology, Ltd.*, 924 F.2d 1484, 1490 (9th Cir. 1991). Specifically, the Ninth Circuit found that five other hospitals--Boulder City Hospital, Hospital of North Las Vegas, St. Rose De Lima Hospital, University Medical Center and Women's Hospital--possibly should not have been included in the submarket.

Defendants argue that, even if the relevant market is conceded, Sunrise Hospital did not have enough market share to establish monopoly power. Market power is the power to force a purchasers to do something he would not do in a competitive market. It has been defined as the ability of a single seller to raise price and restrict output.

Eastman Kodak v. Image Technical Services, 504 U.S. 451, 464 (1992). Monopoly power may be inferred from a "predominant" share of the market. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (finding monopoly power in 87% of the market). Learned Hand's famous formulation in *United States v. Aluminum Co. of American*, 148 F.2d 416, 424 (2nd. Cir. 1945) was 90% is "enough" but 60-64% is "doubtful."

Defendants claim Sunrise's share of the alleged submarket is no more than 50-55%, and that share declined by 4% during the relevant period. #996 at 8. Plaintiffs claim Sunrise had 60-65% of the market. Plaintiffs also claim Sunrise had "close to" 60% of the gross patient revenues, excluding medicare and medicaid. #1001 at 6. Plaintiffs then claim these are sufficient for a finding of monopolization when coupled with the other factors such as monopoly on Level III neonatal services and a strong barrier to entry in the form of certificate of need regulations.

However, economic factors besides market share may be taken into consideration. Thus, in *Pacific Coast Agric. Export Assn v. Sunkist Growers*, 526 F.2d 1196, 1204 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976), the Ninth Circuit held that control over the supply of oranges and the relatively small size (no single competitor over 18% of market) of competitors in the distribution market made it possible for the jury to find market power in the distribution market where Sunkist had a market share from 45-70% over the relevant period.

In *Kodak and Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984), the Supreme Court recognized economic factors relevant to the current inquiry. The *Kodak*

court noted such factors are important where rational economic explanations "may not accurately explain the behavior of the [market]." 504 U.S. at 473. In *Kodak*, the Court noted that Kodak's practice of pricing service and parts separately for the initial sale of its machines prevented purchasers from obtaining an accurate estimate of the "life cycle" cost of a photocopier; thus, Kodak could charge supra competitive prices as the sole supplier of parts and service, despite having only a 2-23% share of the photocopier market. *Id.* at 472-73; *Image Technical Serv., Ins. V. Eastman Kodak Co.*, 903 F.2d 612, 616 n.3 (9th Cir. 1990) (noting that Kodak had market share of 23% of the copier market, 20% of the micrographic equipment market, and less than 2% of the plain paper copier market). Also, because of the high initial outlay in buying the machines, customers were precluded from switching vendors. *Id.* at 477. Thus, the court identified two factors affecting elasticity of demand: information deficiencies and high switching costs. In *Jefferson Parish*, the Court did not find market imperfections sufficient to show monopolization with a 30% share of a market. However, the Court noted that the imperfections at issue--lack of consumer incentive to compare costs among hospitals and lack of adequate information with which to compare quality among hospitals--could create antitrust liability if they were accompanied by restraints on a consumers' choices for healthcare providers. 466 U.S. at 27. Also, in examining the exclusive contract for anesthesiology, the Court implied that elasticity of supply could be affected by an alleged monopolist that lowers the

ability of sellers to enter the market.[1] *See id.* at 7-8 and nn.

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[1] Other cases have relied heavily on the factor of barriers into the market. For instance, *Reazin v. Blue Cross and Blue Shield of Kansas*, 899 F.2d 951, 969-72 (10th Cir. 1990) upheld a jury's finding of monopoly power where the relevant market share was between 47%-62%. The court noted the following factors as relevant, in light of less-than-presumptive market share: Blue Cross had certain historical advantages (it was the first health care insurer in the state, it was chartered under special legislation), Blue Cross had power over price and power to exclude competition (its "most favored nations clause" hindered the development of "alternative delivery systems" [Blue Cross's first real competition]), barriers to entry were not "insubstantial" (this finding was based on the fact that there were over 200 insurers and no one approached Blue Cross's dominance of the market), and the existence of "peculiar characteristics of the health care financing market in Kansas" such as Blue Cross's unique ability for a period to contract directly with hospitals and the widespread impression that Blue Cross alone had the legislature's "special imprimatur."

In Syufy Enterprises v. American Multicinema, Inc., 793 F.2d 990, 995-96 (9th Cir. 1986), the court upheld a finding of monopoly power with a 60-69% share of the market in theaters. The court relied on fragmentation of competition, finding that during the relevant period no competitor had over 24.7% of the market, which ranged sometimes to as low as 12%. The court also relied on barriers to entry, finding that exclusive runs of movies were a deterrent to the establishment of more theaters.

7-8. Thus, under these two cases, there are three relevant market imperfections affecting demand in healthcare: (1) information deficiencies; (2) high switching costs; and (3) financing arrangements that reduce price competition, if accompanied by restrictions on consumers' choices of products. The Court should also examine elasticity of supply, as determined chiefly by barriers to entry into the market.

Analysis of these cases shows that no market power of 60%, on its own, has been deemed enough to given rise to a monopoly. Thus, the analysis hinges on market imperfections. There is great potential for such imperfections in the market for health care services. In the present case, plaintiffs allege that despite a falling market share, Sunrise had the highest profits of any hospital in Nevada, which had the highest profits in the country. In the

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In Metro Mobile CTS, Inc. v. Newvector Communications, Inc., 892 F.2d 62,63 (9th Cir. 1989), the court upheld a finding of no monopoly power in part because there were no significant barriers to entry. Regulations required only that entrants into the market have sufficient financial backing, which plaintiff had.

One treatise argues that after market share, barriers may be the most important factor. Irving Scher, *Antitrust Advisor*, 4th ed., § 1.26. *See also Los Angeles Land Co. V. Brunswick Corp.*, 6 F.3d 1422, 1426-27 (9th Cir. 1993) (near 100% market with no barriers not enough for a monopoly); *U..S. v. Syufy*, 903 F.3d 659, 664-69 (same); *Energex Lighting v. North American Philips Lighting*, 656 F.Supp 914, 921 (SDNY 1987) (low market share with strong barriers enough to survive summary judgment).

health care market, where employers typically pay for health insurance, consumers lack incentive to compare prices. Further, insurers' lack of incentive to provide clear pricing information creates an information deficiency. Consumers thus may be injured by paying higher premiums and co-payments.

Also, regarding financing arrangements coupled with restricted choice, by splitting the payor from the consumer, insurers may exploit the market. This is because the consumer/insureds had no other choice for level III neonatal care, but they were not the parties ultimately responsible for paying the premiums. Furthermore, the alleged threats to doctors recommending other hospitals could have the effect of restricting consumer choice.

The alleged threats to physicians also could affect supply. This is in effect a barrier into the market for other hospitals. Also, "dumping" indigent patients could be a barrier into the submarket because, if the relevant market eventually is defined as the major for-profit acute care hospitals in Nevada, then sending low-paying patients to other hospitals could preclude those hospitals from becoming profitable enough to enter the submarket. Finally, there is the issue of the certificate of need regulations closing access to the submarket.

In sum, the market imperfection factors made this case very close. In such a close question, it is important to note that the Supreme Court has stated its distaste for resolving antitrust cases on "formalistic distinctions rather than market realities." *Kodak*, 504 U.S. at 466. The preference in antitrust law is to "resolve antitrust claims on a case-by-case basis...." *Id.* (citations omitted). Thus, this case should

proceed to trials so that the finder of fact can assess all of the relevant "market realities."

II. The Premium Payors' Standing

Defendants argue that because there is no evidence of a monopoly in the health insurance market, the Premium Payors have no claim for premium overcharges. However, the Ninth Circuit's opinion clearly states "[t]hese high prices translated into higher copayments and premium payments. 114 F.3d at 1478. The cases cited by the Ninth Circuit--*Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) and *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979)-provide that consumers have standing to sue under antitrust laws when they suffer a price increase resulting from anticompetitive conduct; as purchasers of health insurance, the Premium Payors were consumers and have such standing.

III. The McCarran-Ferguson Act

Defendants argue plaintiffs' antitrust claims are preempted by the McCarran-Ferguson Act, 15 U.S.C. § 1011, et seq., which is an "anti-preemption" statute stating that no acts of Congress shall preempt state law "regulating the business of insurance" unless the federal law specifically relates to the business of insurance. The Ninth Circuit above found that the McCarran-Ferguson Act did not bar application of RICO to the kickback scheme alleged in this case. 114 F.3d at 1480.

Applicable subsections of the McCarran-Ferguson Act read:

15 U.S.C. § 1012(b):

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance...unless such Act specifically relates to the business of insurance: Provided, That after June 30, 1948, the [antitrust acts] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1013(b):

> Nothing contained in the McCarran-Ferguson Act shall render the Sherman Act inapplicable to an agreement to boycott, coerce, or intimidate, or act of boycott, coercion or intimidation.

In the case above, the Ninth Circuit stated that the McCarran-Ferguson Act precludes a federal statute if:

> (1) The federal statute does not specifically relate to the business of insurance; (2) the acts challenged under the statute constitute the business of insurance; (3) the state has enacted a law or laws regulating the challenged act and (4) the state law would be superceded, impaired or invalidated by the application of the federal statute.

114 F.3d at 1479. Neither side recognizes that the rest must be applied "from the ground up." The court cannot utilize the Ninth Circuit's McCarran-Ferguson/RICO analysis because (1) the relevant federal law in that analysis was RICO, not the Sherman Act, (2) the acts challenged were fraud relating to the kickback scheme, which the Ninth

Circuit explicitly stated provided no basis for antitrust relief and (3) the state law was analyzed as it related to RICO.

As a preliminary matter, the court notes there appears to be some confusion as to whether the four part test outlined above applies to antitrust analysis. In their argument concerning the fourth prong of that test, defendants claim the holding by the Ninth Circuit on the RICO issue "is not applicable to plaintiffs' antitrust claims, since the McCarran-Ferguson test does not require invalidation or impairment." #996 at 14. This assertion is perplexing. Defendants continue by detailing the history of the McCarran-Ferguson Act, and its passage specifically to limit the application of the Sherman Act to the business of insurance. As the Supreme Court stated shortly after the passage of the Mccarran-Ferguson Act. "(o)bviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946). The Court later stated "Congress was mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies." 393 U.S. 453, 457 (1969). However, while the McCarran-Ferguson Act does mention antitrust regulation specifically, it was passed with a general concern for federal incursion on an activity traditionally regulated by the States. The declaration of policy of the McCarran-Ferguson Act, 15 U.S.C. § 1011, states "silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States;" this does not single out the Sherman Act or antitrust law. Thus, the same four part test used to assess

any federal regulation's incursion on state regulation must be used to assess incursion by the Sherman Act.

Regarding the first prong of this test, it is clear that the Sherman Act does not specifically relate to the business of insurance.

Regarding the second prong, plaintiffs argue that the acts challenged do not constitute the business of insurance because they "take place in the hospital market, not the health insurance market." #1011 at 11. By making this argument, plaintiffs undermine their own standing to bring this suit. Plaintiffs can bring this case because they are purchasers and co-payors in the insurance market, and the alleged anticompetitive acts at Sunrise-a Humana controlled hospital-raised prices. 114 F.3d at 1478. In analyzing the RICO claims under the McCarran-Ferguson test, the Ninth Circuit stated "[t]he acts the plaintiffs challenge are analytically equivalent to the overcharging for premiums alleged in Merchants Home." 114 F.3d at 1480. The same conclusion applies here because the anticompetitive acts result in overcharging for premiums.

Regarding the third prong, court finds that Nevada has enacted a law regulating the challenged acts. NRS § 686A.010 states that the purpose of the Trade Practices and Frauds; Financing of Premiums Act (Act) is to regulate by defining or determining "all such practices in this state which constitute unfair methods of competition...." As noted by the Ninth Circuit, under the Act, the Nevada Commissioner of Insurance has "exclusive jurisdiction" to regulate the trade practices of the business of insurance. NRS § 686A.015. Finally, NRS § 686A.170 states:

> 1. If the commissioner believes that any person engaged in the insurance business is in the conduct of such business engaging in this state in any method of competition or in any act or practice not defined in NRS 686A.010 to 686A.310, inclusive, which is unfair or deceptive and that a proceeding by him to respect thereto would be in the public interest, the commissioner shall, after a hearing of which notice and of the charges against such person are given him, make a written report of his findings of fact relative to such charges and serve a copy thereof upon such person and any intervener at the hearing.

This general prohibition against unfair competition is sufficient, when combined with the statement of "exclusive jurisdiction," to show that Nevada has enacted a law regulating monopolistic conduct.

The fourth factor is whether the application of the Sherman Act would "invalidate, impair, or otherwise supersede Nevada's legislation." 114 F.3d at 1480. In the case above, the court found that there was "some symmetry between RICO's private right of action and Nevada's administrative scheme under NRS chapter 686A]." *Id.* Similarly, in this case, plaintiffs have a private cause of action under the Sherman Act, and there are also administrative remedies under chapter 686A. The court can find no greater conflict between the NRS and the Sherman Act than exists between the NRS and RICO. Therefore, the court is bound to follow the Ninth Circuit's holding that

"[t]this symmetry, however, does not create a conflict between federal and state law."[2] 114 F.3d at 1480.[3]

IV. Antitrust Damages

Defendants move for summary judgment on the ground that plaintiffs have failed to provide sufficient evidence to permit the jury to make a reasoned estimate of damages caused by the alleged unlawful conduct. However, the Ninth Circuit's opinion provides an adequate framework for deciding damages. Plaintiffs may have been forced to pay higher copayment and premium payments; those increases

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[2] The court is mindful of the fact that the RICO portion of this case has been taken up on certiorari by the Supreme Court. However, the present state of the law in the Ninth Circuit dictates this result.

[3] The court also notes that even if the McCarran-Ferguson Act were to preempt federal regulation by the Sherman Act, 15 U.S.C. § 1013(b) may be applicable. § 1013(b) provides:

> Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, intimidate, or act of boycott, coercion, or intimidation.

The language of this section is broad and unqualified, and it covers any act or agreement amounting to boycott, coercion, or intimidation. *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 98 S.Ct. 2923 (1978). In the present case, the alleged threats to doctors who referred patients to hospitals other than Sunrise could be considered coercion or intimidation.

"would constitute antitrust injury of the type the antitrust laws were designed to prevent." 114 F.3d at 1478. When calculating the antitrust damages, the court stated "the jury will be faced with the difficult task of separating the antitrust damages from the damages resulting from Humana's kickback scheme." *Id.* With these guidelines in mind, the plaintiffs will be allowed to put on evidence of damages at trial. After trial, defendants may renew their motion on the sufficiency of the evidence.

Further, once antitrust injury and causation have been shown, plaintiffs' burden in establishing damages greatly lessens. As the Supreme Court has stated, once violation has been shown, not to allow damages because of uncertainty would "be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damage uncertain." *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1981). A reasonable estimation allows plaintiff to recover damages even if they are merely an approximation. *D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982). Once injury and causation are demonstrated, the trier of fact will be permitted to "make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly," *Bigelow* at 265. In the present case, the Ninth Circuit has identified three areas of causal antitrust injury, and it has stated that damages, while being difficult to calculate, are determinable. 114 F.3d at 1478. Defendants' motion will be denied on this point.

V. The Attempted Monopolization Claims

Finally, defendants supplemental memorandum moves for summary judgment on the rather common sense notion that plaintiffs, as consumers and users of health insurance, cannot state a claim for attempted monopolization because they would sustain no damage unless the monopoly in fact existed. #1022. Plaintiffs have provided no viable argument on this point. Because the Ninth Circuit identified plaintiff's damages as stemming from higher co-payments and premiums caused by anticompetitive conduct, it is impossible to have any such injury without that anticompetitive conduct. Thus, summary judgment on the claims of attempted monopolization will be granted. *See In Re Air Passenger Computer Reservation Systems*, 727 F. Supp. 564, 569 (C.D. Cal. 1989) (digesting relevant cases and concluding that consumers are damaged by monopoly, not attempted monopoly), *aff'd sub nom.*, 948 F.2d 536 (1991). Summary judgment will be granted on the claims of attempted monopolization.

Accordingly, **IT IS HEREBY ORDERED** that defendants' motion for summary judgment (#996, 1022) is GRANTED IN PART. The motion in GRANTED as to plaintiffs' claims of attempted monopolization (i.e., the argument raised in the supplemental memorandum, #1022). In accordance with this order it is DENIED in all other respects.

DATED: This 15th day of September, 1998.

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UNITED STATES DISTRICT JUDGE